Supreme Court, U.S.
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In The

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION,
AMERICAN RE-INSURANCE COMPANY, ET AL.,

Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS
COMMISSIONER OF INSURANCE FOR
THE STATE OF CALIFORNIA,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE NAIC[1]

The NAIC is a non-profit corporation whose membership consists solely of the principal insurance regulatory officials of the fifty States, the District of Columbia, the territories and insular possessions of the United States. Started in 1871, it has been the nation's oldest association of state government officials. The members of the NAIC completely control the same.

The NAIC performs many services on behalf of state government, including the development and publication of model laws, regulations and bulletins, financial and accounting standards, the management of accreditation standards for and coordination of the review of insurance departments, the operation of extensive financial and regulatory databases, education and training programs for state, federal and international financial regulators, the operation of the Securities Valuation Office and the International Insurers Department, coordination of quarterly national meetings and interim meetings of various NAIC committees, task forces and working groups and the creation and publication of white papers, consumer guides, handbooks, periodicals and the *Proceedings of the NAIC*. Hundreds of state and federal laws make reference to and incorporate NAIC standards and publications.

In filing this *amicus curiae* brief, the NAIC seeks to demonstrate its interest in this proceeding and to fulfill

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[1] Neither counsel for the parties to this matter authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this *amicus curiae* brief. Stipulations indicating their consent have been filed with the Clerk of the Court.

the mission of the NAIC, as set out in its Annual Report, to:

> . . . assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members:
>
> 1. Protect the public interest, promote competitive markets and facilitate the fair and equitable treatment of insurance consumers;
>
> 2. Promote the reliability, solvency, and financial solidity of insurance institutions; and
>
> 3. Support and improve state regulation of insurance.

The Executive Committee of the NAIC voted to file this *amicus curiae* brief to demonstrate its support of Respondent John Garamendi, Commissioner of Insurance for the State of California, in this cause. The interest of the NAIC in this matter arises out of the regulatory responsibility vested in each insurance commissioner, director and superintendent to see that all laws respecting insurance companies and the types of policies offered for sale in his or her State are executed faithfully and to safeguard the solvency and financial integrity of insurance companies for the benefit of insurance consumers. The commissioners, directors and superintendents of the various States, the members of the NAIC, are charged with the responsibility of regulating the business of insurance within their jurisdictions pursuant to the

McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, and State insurance laws.

The members of the NAIC have reviewed the decisions of the U.S. Circuit Court of Appeals and the various briefs filed by the parties in this cause and believe the issues involved are of great interest and concern. The NAIC has extensive experience with the interpretation and application of the McCarran-Ferguson Act and various State laws, many of which are based on NAIC model laws, along with constitutional challenges and administrative law matters. The members of the NAIC are the statutory heads of state insurance departments which have approximately 11,000 staff members, including 282 actuaries, 681 rate and form analysts, and 1,175 financial examiners. NAIC, *2001 Insurance Department Resources Report* Tables 3 and 6 (2002).

With regard to the McCarran-Ferguson Act, this Court has stated that "[t]he views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill." *Group Life and Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979).

The NAIC is strongly committed to the prompt and just resolution of unpaid insurance claims of Holocaust victims, survivors, their heirs and beneficiaries. To that end it established the International Commission on Holocaust Era Insurance Claims (ICHEIC) in 1998 in conjunction with several European insurance companies, European regulators, representatives of several Jewish organizations and the State of Israel.

The NAIC's members ask that this Honorable Court uphold the right of the State of California to regulate insurance companies that do business within its borders

by enacting and enforcing the Holocaust Victim Insurance Relief Act (HVIRA), which requires information from insurance companies within the State of California that the California State Legislature, in its judgment, has determined is "necessary to protect the claims and interests of California residents. . . . " Cal. Ins. Code § 13801(f). The members of the NAIC believe that such an outcome is in the best interest of insurance consumers, to whom all insurance commissioners, superintendents and directors (all of whom are members of and control the NAIC) are charged by both State and Federal law to protect.

SUMMARY OF ARGUMENT

Amicus curiae National Association of Insurance Commissioners urges this Honorable Court to affirm the decision of the U.S. Court of Appeals in this cause. Congress, through the McCarran-Ferguson Act, the U.S. Holocaust Assets Commission Act of 1998 and the Gramm-Leach-Bliley Act, has given full authority to the State of California to regulate the business of insurance by means of the Holocaust Victim Insurance Relief Act. The past decisions of this Court fully support the concerns and actions of the State of California in this matter. Should the reasoning of the Petitioners be sustained, state insurance regulators will be gravely hampered in their ability to oversee the safety, soundness, integrity, reputation and solvency of insurance companies that have foreign or alien affiliates. The members of the NAIC do not believe such an outcome is in the best interest of our nation's citizens. The past decisions of this Court and the laws enacted by

Congress dictate that the decision of the U.S. Court of Appeals is correct and should be affirmed.

ARGUMENT

A. THE BUSINESS OF INSURANCE IS SO IMBUED WITH A COMPELLING PUBLIC INTEREST THAT IT JUSTIFIES CALIFORNIA'S ENACTMENT OF THE HVIRA.

This Court has long held that the business of insurance is so qualitatively different from ordinary commerce that government is fully justified to regulate it by methods and to degrees far different from ordinary business. Insurance pervades our society and is an indispensable factor in our economic system. Insurance companies amass and control incredible sums of money in a fiduciary role for the future benefit of their insureds.[2] At its core insurance is a complicated, contingent promise to pay at some time that may be far in the future significant sums of money. Families and businesses literally stake their future on the promises insurance companies make to them. The nature, structure and mechanisms of insurance are so complex that ordinary citizens rely on and demand governmental regulation to ensure that insurance companies remain solvent, act ethically, charge fair rates and pay claims.

[2] Year 2000 combined total assets for the property/casualty and life/health segments were approximately $4,213,918,070,000. NAIC, *Statistical Compilation of Annual Statement Information for Property/Casualty Companies in 2000* Table 2 (2000); NAIC, *Statistical Compilation of Annual Statement Information for Life/Health Companies in 2000* Table 2 (2000).

Congress, in passing the McCarran-Ferguson Act, expressed its intent to allow state governments to continue to oversee the business of insurance because of their long experience and expertise in this very complicated and arcane area of financial regulation.

This Court has long recognized these facts. "The underlying principle is that business of certain kinds hold such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation. . . . [T]he business of insurance has very [definite] characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world. . . . It . . . according to the sense of the world from the earliest times, – certainly the sense of the modern world, – is of the greatest public concern." *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 411-415 (1914). *Accord*, *California State Auto. Ass'n Inter-Insurance Bureau v. Maloney*, 341 U.S. 105, 109-110 (1951). The members of the NAIC believe these words are even more true now than when the Court wrote them almost ninety years ago.

The California law at issue here, the Holocaust Victim Insurance Relief Act of 1999 (HVIRA), is a law that regulates insurance companies in California. Contrary to what has been asserted by the companies contesting the law, one of its expressed purposes is to "protect the claims and interest of California residents." Cal. Ins. Code § 13801(f). While the opponents of the law argue that its purpose is to force alien insurance companies to pay claims to non-California citizens based on polices purchased in Europe, the statute on its face has the expressed purpose to protect California residents. No state insurance regulator would ever grant a license to an insurance company that has

refused to provide policy information. For an insurance company to be financially affiliated with a company that is refusing to provide the information people need in order to perfect a claim – information that is not available elsewhere – is a matter of no small consequence to that company's insurance regulator and to the public.

An insurance company's good name is essential to its solvency and its ability to pay claims in the future. The members of the NAIC believe the California legislature was fully justified in requiring all companies doing business in California to produce any information that, in the legislature's judgment, could affect the company's reputation and good name in order to be assured that California citizens will have continued confidence in the company. Just as government regulators go to great extremes to ensure the public has confidence in the banking system, insurance regulators likewise go to great extremes to ensure the public will have confidence their insurance company will pay their claims if and when they come due in the future.

The briefs of Petitioner and Respondent Gerling Companies devote a great deal of argument to the proposition that the HVIRA is inefficient, it only affects a small number of claimants, it is not the best strategy to use for for the above goals and that, quite simply, the California legislature was unwise in enacting the legislation. However, " . . . the courts are not enpowered to second-guess the wisdom of state policies." *Western and Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 670 (1981). "Whether California's program is wise or unwise is not our concern." *California State Auto. Ass'n Inter-Insurance Bureau*, 341 U.S. at 110.

Likewise, the Petitioner and Respondent Gerling Companies briefs quote comments of various state officials at press conferences and hearings as to the "true" purpose that the California Legislature had in mind when it passed the HVIRA. Yet the legislation itself states that one of its purposes is to "protect the claims and interest of California residents." The NAIC members believe that is enough, and the miscellaneous post-enactment quotes from a myriad of state officials that were selectively pulled from the public media and referenced in Petitioner and Respondent Gerling Companies' briefs are unqualifiedly irrelevant in a court of law.

B. CONGRESS, IN ENACTING THE MCCARRAN-FERGUSON ACT, GRANTED TO CALIFORNIA FULL AUTHORITY TO REGULATE INSURANCE COMPANIES BY MEANS OF THE HVIRA.

This Court has held that the intention of the McCarran-Ferguson Act was to "broadly . . . give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946). One court noted this meant that ". . . state authority in the area of insurance regulation should enjoy a presumption of validity. We refuse to adopt the position of requiring the least intrusive means of protecting insurance company-policyholder relations. . . . " *Professional Investors Life Ins. Co., Inc. v. Roussel*, 528 F.Supp. 391, 402 (D. Kan. 1981).

Congress recently reaffirmed the role of the states in regulating the business of insurance when it passed the Gramm-Leach-Bliley Act:

> (a) State Regulation of the Business of Insurance. The Act entitled "An Act to express the intent of Congress with reference to the regulation of the business of insurance" and approved March 9, 1945 (15 U.S.C. 1011 et seq.) (commonly referred to as the "McCarran-Ferguson Act") remains the law of the United States.
>
> (b) Mandatory Insurance Licensing Requirements. No person shall engage in the business of insurance in a State as principal or agent unless such person is licensed as required by the appropriate insurance regulator of such State in accordance with the relevant State insurance law. . . .

15 U.S.C. § 6701. Congress also stated in Title III of the Gramm-Leach-Bliley Act that "[t]he insurance activities of any person . . . shall be functionally regulated by the States, subject to section 104." 15 U.S.C. § 6711. These provisions became law on November 12, 1999.[3]

By specifically including these provisions in the Gramm-Leach-Bliley Act in 1999, "Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the

[3] The HVIRA became effective on October 10, 1999.

whole weight of its power behind the state systems, notwithstanding these variations." *Prudential Ins. Co.*, 328 U.S. at 430. The members of the NAIC believe that Congress has thus thrown the whole weight of its power behind California's insurance regulatory system, including the HVIRA. The U.S. Court of Appeals for the 9th Circuit certainly came to this conclusion. "[W]e conclude that Congress was aware of the states' involvement in this area and, at least implicitly, encouraged laws like HVIRA." *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739, 749 (9th Cir. 2001).

The Court has previously ruled that "[i]f Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge. Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act ... [t]he unequivocal language of the Act suggests no exceptions." *Western and Southern Life Ins. Co.*, 451 U.S. at 652-653. These words stand in stark contrast to the assertions of the Petitioner and others who want this Court to rewrite the McCarran-Ferguson Act.

Respondent Gerling Companies argues in its brief that the McCarran-Ferguson Act limits state insurance regulators to whatever authority they had to regulate under the Commerce Clause and the Due Process Clause that was set out by this Court in its controlling decisions at the time the Act became effective in 1946. *Brief for the Respondents – Gerling Companies – in Support of Petitioners*, p. 33-35. The members of the NAIC strongly disagree. Even the legislative history cited by Respondent Gerling

Companies refutes this assertion. "Briefly, your committee is of the opinion that we should provide for continued regulation and taxation of insurance by the States, subject always, however to the limitations set out in the controlling decisions of the United States Supreme Court. . . . " Cong. Serv., 79th Cong., 1st Sess. 1945, pp. 671-672. This particular statement, from the House Report, did not say the limitations will be set by the then current controlling decisions of this Court. It said just the opposite, that the limitations will always be set by the controlling decisions of the Court. This Court also has previously rejected this argument. "We reject appellee's argument that the McCarran-Ferguson Act altered constitutional standards other than those derived from the Commerce Clause." *Western and Southern Life Ins. Co.*, 451 U.S. at 656. "Congress, of course, does not have the final say as to what constitutes due process under the Fourteenth Amendment. And while Congress has authority by § 5 of that Amendment to enforce its provisions [citing cases], the McCarran-Ferguson Act does not purport to do so." *State Board of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 457 (1962).

C. STATES MUST HAVE THE ABILITY TO OBTAIN INFORMATION CONCERNING AFFILIATE ENTITIES OF INSURERS DOING BUSINESS WITHIN THEIR BORDERS IN ORDER TO PROTECT THEIR CITIZENS.

The United States in its *amicus curiae* brief argues that it is simply impermissible for a state insurance regulator to "compel conduct beyond the boundaries of the State" by requiring the "collection, compilation, and disclosure of detailed information, presumably located in Europe." *Brief for the United States as Amicus Curiae*

Supporting Petitioners, p. 24. The members of the NAIC believe that such a prohibition, should it ever come about, would be disastrous for insurance regulation.

In this era of vast, multi-national, financial holding companies, with interlocking directorates and sophisticated funding and reinsurance arrangements, any financial regulator would be horrified at the prospect of not having the full ability and right to inquire of the reputation, character, financial and managerial details of an insurer's parent and affiliates. If such an insurer should ever state that it cannot supply such information because of some foreign legal prohibition, the regulator would not hesitate to take the appropriate action to protect his or her state's citizens regardless.

The information required is certainly not limited to financial data. This Court has previously noted that trustworthiness and competence is equally important to the licensing process. "[T]he requirement that the license shall issue only after a finding of trustworthiness and competence by the commissioner cannot be taken to be other than an appropriate means of safeguarding the public against the obvious evils arising from the lack of those qualifications." *Robertson v. California*, 328 U.S. 440, 450 (1946).

If Petitioner's arguments are sustained, alien insurers could have the ability to withhold any type of information from financial regulators, while domestic insurers won't. This would not be a level playing field. "And in the view of the well-known conditions of competition in this field, such a result not only would free out-of-state insurance companies and their representatives of the regulation's effect, thus giving them an advantage over local competitors, but

by so doing would tend to break down the system of regulation in its purely local operation." *Id.*, 328 U.S. at 449. "In short, the result would be ultimately to force all of the states to accept the lowest standard for conducting the business permitted by one of them, or, perhaps, by foreign countries." *Id.*, 328 U.S. at 460.

The HVIRA does not require any analysis, inquiry or evaluation of alien financial or privacy laws. It does not require the commissioner or any judge to investigate their requirements or enforceability. It simply requires an insurance company doing business within California's borders to produce information the California legislature, in its wisdom, determined is necessary "to protect the claims and interests of California residents." In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Court found that the probate law at issue required "minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should 'not preclude wonderment as to how many may have been denied 'the right to receive'. . . . " *Id.*, 389 U.S. at 435. This is the antithesis of HVIRA, which requires no inquiry whatsoever except whether or not insurers present within California's borders produce the appropriate regulatory information. Thus, the members of the NAIC believe that the HVIRA is well within California's legislative jurisdiction and is a proper exercise of its police power.

CONCLUSION

The members of the National Association of Insurance Commissioners believe that the Court should reaffirm the

right of the State of California to protect its citizens by enacting and enforcing the Holocaust Victim Insurance Relief Act. Because the business of insurance is affected with a compelling public interest and plays such a crucial role in our economy and the daily lives of our nation's citizens, because regulators must have the legal ability to oversee the integrity, reliability and solvency of insurance companies, because Congress has again confirmed that it has given to the States the duty to oversee the integrity of this industry and because the reliability, solvency, integrity and reputation of countless insurers are dependent on the conduct of their foreign and alien affiliates, the members of the National Association of Insurance Commissioners ask this Honorable Court to affirm the decision of the U.S. Court of Appeals in this cause.

Respectfully submitted,

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